

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

A&K SIGNAL AND UTILITY COMPANY, LLC

and

Case 28–CA–151930

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL NO. 428, AFL–CIO

*Christopher Doyle,*  
*Alexander J. Gancayco*  
for the General Counsel.  
*Muhammad Kayani, pro se*  
for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. I heard this case in Phoenix, Arizona on September 29, 2015, at which time counsel for the General Counsel moved for default judgment based upon A&K Signal and Utility Company, LLC's (the Respondent's) failure to file an answer.

The International Union of Operating Engineers, Local No. 428, AFL–CIO (the Union or Charging Party) filed the original charge in the above-captioned case on May 11, 2015, and an amended charge on July 29. The General Counsel issued the complaint on July 31, 2015, and it was served on the Respondent. The complaint notified the Respondent of its obligation, under Sections 102.20 and 102.21 of the Board's Rules and Regulations, to file an answer on or before August 14. The complaint also put the Respondent on notice that if it did not file an answer, the Board may find, pursuant to a motion for default judgment, that the complaint allegations are true.

Having received no answer, on August 17, the General Counsel sent the Respondent a letter permitting the Respondent to file an answer by August 24. The General Counsel stated that if an answer was not received by that date, a motion for default judgment would be filed.

On August 20, the General Counsel issued an order severing cases and withdrawing the July 31 complaint. That same day, the General Counsel reissued the complaint and served it on the Respondent. The reissued complaint notified the Respondent of its obligation to file an answer on or before September 3, and affirmatively informed the Respondent that failure to file a timely answer would result in a motion for default judgment.

Having not received a timely answer, on September 4, the General Counsel sent the Respondent a letter advising that it must file and serve its answer by September 11, and its failure to do so would result in a motion for default judgment.

On September 14, the General Counsel filed a motion for default judgment with the administrative law judge.

I conducted a prehearing conference via telephone on September 23, 2015, which the Respondent failed to attend.

The complaint alleges the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by laying off three employees, and that the Respondent violated Section 8(a)(5) and (1) by failing to provide notice and an opportunity to bargain over the layoffs, and by ceasing to make various trust fund contributions to the Union.

#### *A. Default Judgment Legal Standards and Ruling*

Under Section 102.20 of the Board's Rules and Regulations, allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown.

The Respondent did not file an answer at any time. The Respondent's owner, Muhammad Kayani, appeared at the scheduled hearing on September 29. As the record reflects, he was given the opportunity to establish good cause for failing to file an answer to the complaint, but he failed to do so. When asked why he failed to answer the complaint allegations, he stated he did not have the resources to pay the Union. When asked if he had gathered and brought in documents the General Counsel had requested pursuant to a subpoena, Kayani replied that he had not.

After giving the General Counsel an opportunity to be heard on its motion for default judgment, Kayani was given another chance to offer a reason for failing to file an answer, but no valid reason was forthcoming.

The parties were provided an opportunity to file briefs concerning whether default judgment is warranted no later than October 14. Both parties filed briefs. The Respondent did not provide a reason for failing to file an answer. Kayani explained the circumstances leading to the Respondent ceasing to make contributions to the Union's trust fund and the reason the

employee named in the complaint ceased working for the Respondent. Kayani also indicated that A&K has since gone out of business and is working on meeting its debts.<sup>1</sup>

Based on the foregoing, I find the Respondent has not established good cause for failing to file an answer, and I deem the complaint allegations admitted.

On the entire record, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, Respondent has been a limited liability company with an office and place of business in Phoenix, Arizona (Respondent's facility), and has been engaged in the business as a heavy equipment operating subcontractor. In conducting its operations during the 12-month period ending May 11, 2015, Respondent purchased and received at Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of Arizona. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. (Complaint paragraphs 2 and 3.)

### II. COMPLAINT ALLEGATIONS DEEMED ADMITTED

At all material times, Muhammad Kayani has held the position of Owner and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (Complaint paragraph 4.)

The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All A-Frame Boom Truck; Air Compressor Operator; Beltcrete Operator; Boring Bridge and Texture; Brakeman; Concrete Mixer Operator (skip type); Conductor; Conveyor Operator; Cross Tineing and Pipe Float; Curing Machine Operator; Dinky Operator (under 20 tons); Elevator Hoist Operator (Husky & similar); Fireman (all); Forklift & Ross Carrier Operator; Generator Operator (all); Handler; Highline Cableway Signalman; Hydrographic Mulcher; Hydrographic Seeder; Joint Insertter; Jumbo Finishing Machine; Kolman Belt Loader Operator; Machine Conveyor Operator; Multiple Power Concrete Saw Operator; Oiler; Pavement Breaker; Power Grizzly Operator; Power Sweeper; Pressure Grout Machine Operator (as used in heavy engineering construction); Pump Operator; Roller Operator (except as otherwise classified); Self-Propelled Chip Spreading Machine; Skiploader (3 c.y. & less); Slurry Seal Machine Operator (moto-paver driver); Small Self-Propelled Compactor (with blade)-backfill, ditch-operation; Straw Blower; Tripper Operator; Tugger Operator; Welding Machine Operator; Wheel-Type Tractor Operator (Ford-Ferguson type with attachments, etc.); Winch Truck; Aggregate Plant

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<sup>1</sup> I do not have reason to doubt Kayani in this regard. If, in fact, the Respondent has gone out of business, the best course of action would seem to be for the parties to work toward settling the case.

Operator (including crushing, screening and sand plants, etc.); Asphalt Laydown Machine Operator; Asphalt Plant Mixer Operator; Backhoe Operator (Rubber Tire or Track less than 1 c.y.); Bee Gee Operator; Boring Machine Operator; Concrete Pump Operator; Concrete Mechanical Tamping Spreading or Finishing Machine Operator (including Clary, Johnson or similar types); Concrete Batch Plant operator (all types and sizes); Concrete Mixer Operator (paving type and mobile mixers); Crane Operator (crawler and pneumatic less than 15 tons capacity MRC); Drilling Machine Operator (including water wells); Elevating Grader Operator (all types and sizes, except as otherwise classified); Electrician Ground Man (assisting lineman electrician); Field Equipment Serviceman; Locomotive Engineer (including Dinky 20 tons weight and over); Moto-Paver (and similar type equipment) Operator; Motor Grader Operator (any type power blade-rough); Oiler Driver; Operating Engineer Rigger; Pneumatic Tired Scraper Operator (all sizes and types); Power Jumbo Form Setter Operator; Road Oil Mixing Machine Operator; Roller Operator (on all types asphalt pavement); Screed Operator; Self-Propelled Compactor (with blade) (815, 825 or equivalent – grade operation); Skip Loader Operator (all types with a rated capacity over 3 but less than 6 c.y.); Slip Form Operator (power driven lifting device for concrete forms); Soil Cement Road Mixing Machine Operator (single pass type); Stationary Pipe-Wrapping & Cleaning Machine Operator; Surface Heater and Planer Operator; Tractor Operator (dozer, pusher-all); Traveling Pipe-Wrapping Machine Operator; Trenching Machine Operator; Tugger Operator (two or more drums); Auto Grade Machine Operator (CMI and similar equipment); Barge Operator; Boring Machine Operator (including Mole, Badger, Horizontal Boring or Directional Boring Operators); Concrete Pump Operator (truck mounted, with boom attached); Crane Operator (crawler or pneumatic over 15 tons & less than 100 ton capacity MRC); Crawler-Type Tractor Operator (with boom attachment and slope bar); Derrick Operator; Gradall Operator; Grade Checker (excluding Civil Engineer); Heavy Duty Mechanic/Welder; Helicopter Hoist Operator or Pilot; Highline Cableway Operator; Mass Excavator Operator (150 Bucyrus, Erie and similar type); Mechanical Hoist Operator (two or more drums); Motor Grade Operator (any type power blade-finish); Mucking Machine Operator; Overhead Crane Operator; Piledriver Engineer (portable, stationary or skid); Power Driven Ditch Lining or Ditch Trimming Machine Operator; Remote Control Earth Moving Machine Operator; Rotomill and Milling Machine Operator (asphalt or concrete planning); Skip Loader Operator (all types with rated capacity 6 c.y. but less than 10 c.y.); Slip Form Paving Machine Operator (including Gunnert, Zimmerman and similar types); Tech Engineer (Survey Instrument Man); Tower Crane (or similar type); Universal Equipment Operator (shovel, backhoe, dragline, clamshell, etc. up to 10 c.y.); Crane Operator (pneumatic or crawler – 100 ton hoisting capacity and over MRC rating); Operating Engineer Electrician (including lineman, tower erector, cable splicer, etc.); Skip Loader Operator (all types with rated capacity of 10 c.y. or more); Survey Party Chief; Universal Equipment Operator (shovel, backhoe, dragline, clamshell, etc., 10 c.y. and over); Electrical Helper Field Equipment; Service Helper Heavy Duty Repair; and Helper Heavy Duty Welder Helper employed by members of the Arizona Chapter of The Associated General Contractors of America, Inc. and of employers who have authorized the Arizona Chapter of The Associated General Contractors of America, Inc. to bargain on their behalf, including Respondent, but excluding executives, superintendents, assistant superintendents, civil engineers and their

helpers, master mechanics, all supervisory employees such as timekeepers, messengers, guards and office workers.

(Complaint paragraph 5(a).)

The Arizona Chapter of The Associated General Contractors of America, Inc. (Arizona Chapter) is composed of employers engaged in the building and construction industry and exists for the purpose, inter alia, of representing its employer members in negotiating and administering collective-bargaining agreements. About September 26, 2013, the Union entered into a collective-bargaining agreement (the CBA) with the Arizona Chapter, effective from July 29, 2013 through May 31, 2016, recognizing the Union as the exclusive collective-bargaining representative of the unit without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act. Since about November 3, 2014, and at all material times, Respondent has been a member of the Arizona Chapter and thereby agreed to recognize the Union and be bound by the agreement described above in paragraph 5(c). From July 29, 2013 to May 31, 2016, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit. (Complaint paragraph 5(b)–(e).)

On about April 30, 2015, Respondent laid off its employees Jarret Simpson, Tony Hood and Juan Lopez because these employees joined and assisted the Union and to discourage employees from engaging in these activities, in violation of Section 8(a)(3) and (1) of the Act. The layoffs, which are mandatory subjects of collective bargaining, occurred without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to its conduct and the effects of this conduct, in violation of Section 8(a)(5) and (1) of the Act. (Complaint paragraphs 6, 7(b)–(c), 8, 9.)

Since about March 2015, Respondent failed to continue in effect all the terms and condition of CBA by ceasing to make contributions to the Union's Health and Welfare Trust Fund, the Union's Pension Trust Fund, Arizona Operating Engineers Joint Apprenticeship and Working Assessment Fund, and the Vacation-Savings Trust Fund, without the Union's consent. The trust fund contributions are a mandatory subject of bargaining. By its actions, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act. (Complaint paragraphs 7(a), (b), (d), 9.)

#### CONCLUSIONS OF LAW

The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(3) and (1) by laying off employees Jarret Simpson, Tony Hood, and Juan Lopez, I shall order the Respondent to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I shall also order the Respondent to compensate Simpson, Hood, and Lopez for any adverse tax consequences of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The Respondent shall be required to remove from its files any and all references to the unlawful layoffs of Simpson, Hood, and Lopez, and to notify them in writing that this has been done and that the discharges will not be used against them in any way.

The General Counsel seeks, as part of the remedy, that Simpson, Hood, and Lopez be reimbursed for search-for-work and work-related expenses, regardless of whether interim earnings are in excess of these expenses. The General Counsel is seeking a change in Board law, and the Board has declined to grant this remedy absent a full briefing by the affected parties. See *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 5 fn. 5 (2015). Accordingly, I decline to include the requested remedy in my recommended order.

Having failed to make all contributions the Respondent was required to make to benefit funds, including the Union's Health and Welfare Trust Fund, the Union's Pension Trust Fund, the Arizona Operating Engineers Joint Apprenticeship and Working Assessment Fund, and the Vacation-Savings Trust Fund, pursuant to the Collective-Bargaining Agreement since about March 2015, as required by the collective-bargaining agreement, the Respondent shall be ordered to make whole its unit employees by making all such delinquent fund contributions on behalf of unit employees that have not been made since that date, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondent will be ordered to reimburse unit employees for any expenses ensuing from its failure to make the required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

If employees have made personal contributions to a fund that were accepted by the fund in lieu of the employer's delinquent contributions, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund. *Distler Construction Co.*, 363 NLRB No. 18, slip op. at 4 (2015).

Having failed to bargain with the Union over the layoffs or the benefit fund contributions, the Respondent will be ordered to, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

### ORDER

The Respondent, A&K Signal and Utility Company, LLC, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against employees for supporting the Union or any other labor organization.

(b) Failing to make contractual contributions to the Union's Health and Welfare Trust Fund, the Union's Pension Trust Fund, the Arizona Operating Engineers Joint Apprenticeship and Working Assessment Fund, and the Vacation-Savings Trust Fund, pursuant to the Collective-Bargaining Agreement on behalf of unit employees.

(c) Failing and refusing to bargain in good faith with the Union as the exclusive, collective-bargaining representative of the unit employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days from the date of the Board's Order, offer Jarret Simpson, Tony Hood, and Juan Lopez full reinstatement to their former jobs or, if those job no longer exists, to

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<sup>2</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

5 (c) Make Jarret Simpson, Tony Hood, and Juan Lopez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

10 (d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

15 (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

20 (f) Make all delinquent payments to the International Union of Operating Engineers, Local No. 428, AFL-CIO's Pension Trust Fund, Arizona Operating Engineers Joint Apprenticeship and Working Assessment Fund, and the Vacation-Savings Trust Fund that have not been made since about March 2015, on behalf of unit employees, and make the unit employees whole for any expenses ensuing from their failure to make such payments, including any additional amounts due to the funds on behalf of unit employees, with interest, in the manner  
25 set forth in the remedy section of this decision.

30 (g) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps  
35 shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2015.

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<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

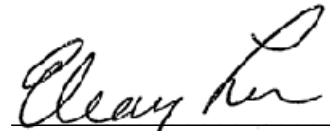


(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. October 21, 2015

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A handwritten signature in cursive script, appearing to read "Eleanor Laws", written in black ink.

*Eleanor Laws*

Administrative Law Judge

## **APPENDIX**

### **NOTICE TO EMPLOYEES**

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### **FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising these rights.

**WE WILL NOT** upon request, fail and refuse to bargain in good faith with the International Union of Operating Engineers, Local No. 428, AFL–CIO (the Union), as the exclusive, collective-bargaining representative of our employees in the unit.

**WE WILL NOT** unilaterally modify the terms of the Collective-Bargaining Agreement without the Union’s consent.

**WE WILL NOT** fail to make contributions that we are required to make to benefit funds, including the Union’s Health and Welfare Trust Fund, the Union’s Pension Trust Fund, the Arizona Operating Engineers Joint Apprenticeship and Working Assessment Fund, and the Vacation-Savings Trust Fund, pursuant to the Collective-Bargaining Agreement.

**WE WILL NOT** lay you off because of your union and other concerted activities.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL** make all contributions we were required to make to benefit funds, including the Union’s Health and Welfare Trust Fund, the Union’s Pension Trust Fund, the Arizona Operating Engineers Joint Apprenticeship and Working Assessment Fund, and the Vacation-Savings Trust Fund, pursuant to the Collective-Bargaining Agreement.

**WE WILL** upon request, bargain in good faith with the Union as the exclusive, collective-bargaining representative of employees in the unit.

**WE WILL** immediately offer Jarret Simpson, Tony Hood, and Juan Lopez reinstatement to their former positions, and if those jobs no longer exist, to substantially equivalent positions, without any loss to their seniority rights or any other privileges.

**WE WILL** immediately make Jarret Simpson, Tony Hood, and Juan Lopez whole with interest, compounded on a daily basis, for the bonuses, dividends, wages and benefits they lost because we laid them off.

**WE WILL** within 14 days, remove from our files, any and all records of the layoffs of Jarret Simpson, Tony Hood, and Juan Lopez and **WE WILL** within 3 days thereafter, notify them in writing that we have taken these actions, and that the materials removed will not be used as a basis for any future personnel action against them or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099  
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/28-CA-151930](http://www.nlr.gov/case/28-CA-151930) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.